82-1677

No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CLAUDE DROLET,

Petitioner,

vs.

JOHN VAN LINDT, as Chairman, and JOSEPH O'DEA and BERTRAM D. SARAFAN, as Members of the New York State Racing & Wagering Board, Division of Harness Racing,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT

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QUESTIONS PRESENTED

Have the Appellate Courts of the State of New York misinterpreted the decision of this Court in *Barry v. Barchi* by affirming the suspension of a harness racehorse trainer under the "Trainer's Responsibility Rule," where the horse was ordered to race over the objection of the agent of the trainer?

2. Is due process of law secured by the 14th Amendment violated by the suspension of a harness racehorse trainer for the condition of a horse, where the agent of the trainer requested the horse to be withdrawn prior to the race?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLAUDE DROLET,

Petitioner,

-against-

JOHN VAN LINDT, as Chairman, and JOSEPH O'DEA and BERTRAM D. SARAFAN, as Members of the New York State Racing & Wagering Board, Division of Harness Racing,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT

OPINIONS BELOW

By order entered the 10th day of February, 1983, the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department did affirm the determination of respondent, suspending petitioner's harness racing license for one year, lifted by respondent on the 18th day of November, 1982. The Appellate Division made its determination,

without an opinion, a copy of its order being reproduced in the appendix herein. By order entered on or about the 30th day of March, 1983, the New York Court of Appeals did deny petitioner leave to appeal to that Court, without an opinion, a copy of the notice of entry and order of the New York Court of Appeals being reproduced in the appendix herein. By administrative "findings and order" dated November, 18th, 1982, respondents did suspend the harness racing license of petitioner for a period of one (1) year, a copy of the findings and order being reproduced in the appendix herein. The hearing officer for respondent did render an opinion dated November 15th, 1982, a copy of which is reproduced in the appendix.

GROUND FOR JURISDICTION OF THIS COURT

The judgment of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department was entered on the 10th day of February, 1983, affirming the determination of respondent suspending petitioner's license for one year. A timely application was made for leave to appeal to the New York Court of Appeals, which was denied by order on or about the 30th day of March, 1983. Respondent did serve a copy of the order of the New York Court of Appeals upon respondent, with notice of entry, on or about the 7th day of April, 1983. A timely petition for certiorari has been filed within sixty days. Jurisdiction is invoked pursuant to 28 U.S.C. 1257 (3).

TEXT OF AGENCY REGULATION INVOLVED

Rule 4120.6 of the Rules of the New York State Racing & Wagering Board provides, as follows:

"A trainer shall be responsible at all times for the condition of all horses trained by him. No trainer shall start a horse or permit a horse in his custody to be started if he knows, or if by the exercise of reasonable care he might have known or have cause to believe, that the horse has received any drug, stimulant, sedative, depressant, medicine, or other substance that could result in a positive test. Every trainer must guard or cause to be guarded each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug, stimulant, sedative, depressant or other substance resulting in a positive test."

Rule 4120.4 of the Rules of the New York State Racing & Wagering Board provides, as follows:

"No person shall, or attempt to, or shall conspire with another or others to: . . . (d) Administer any drug, medicant, stimulant, depressant, narcotic or hypnotic to a horse within 48 hours of its race."

STATEMENT OF THE CASE

On the 30th day of June, 1982, the horse GOLDEN OPPORTUNITY, finished third in a race that night held at Yonkers Raceway. GOLDEN OPPORTUNITY is a harness race horse in the stable owned by JEAN DROLET. His brother CLAUDE DROLET is registered as the trainer of the horse.

Just prior to the race, while the horse was still in the paddock, a routine blood test was taken by a member of the staff of the NYSRWB, which came up positive for an unidentified foreign substance. Peti-

tioner CLAUDE DROLET was not present for the test, but his brother, JEAN DROLET, the owner of the horse, was in attendance. Upon being advised of the result of the test, JEAN DROLET immediately requested that the horse be scratched from the race, undoubtedly cognizant of the "trainer's responsibility rule" that imposes liability upon a trainer, where post race testing establishes the administration of a prohibited substance within forty eight hours of the race. The request of JEAN DROLET that the horse be scratched, was to be substantiated at an administrative hearing, by a Yonkers Raceway security guard, and stands uncontradicted. JEAN DROLET's request, however was denied by the NYSRWB investigator, WILLIAM MARA, who suggested that a second blood test be taken. This one, however, proved to be negative. As a result, MARA insisted that the horse compete, over the objection of the owner. Following the race, with GOLDEN OPPORTUNITY placing third, a more sensitive test was administered—a urine analysis. This post race test proved to be positive reflecting the presence of the drug, Clenbuterol, a bronchial dilator. As a result, petitioner CLAUDE DROLET, was charged with violation of the trainer's responsibility rule, for allegedly administering a medication to a horse, within forty eight hours of a race.

Petitioner was served with notice of charges and a hearing took place before a hearing officer selected by the NYSRWB, who made findings that petitioner had violated the regulations of the agency, despite the fact, that the owner of the horse, had requested that it be scratched in response to a less-sensitive, pre-race blood test that reflected a foreign substance in the

blood of the horse, a copy of the report of the hearing officer being herein annexed. The findings of the hearing officer were confirmed by the NYSRWB, that ordered petitioner to be suspended for a period of one year, during the term of which, "he shall be denied the privileges of the grounds," a copy of the order being herein annexed in the appendix.

Petitioner then brought on an Article 78 Special Proceeding in the New York County Supreme Court to review the determination of the respondent, which proceeding was duly and timely removed to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, for determination. On the 10th day of February, 1983, the Appellate Division, First Department, affirmed the determination of the NYSRWB, in an order, a copy of which is annexed in the appendix, without opinion.

On the 30th day of March, 1983, the application of petitioner for leave to appeal to the New York Court of Appeals was denied, a copy of the order being annexed. On the 7th day of April, 1983, petitioner was served with a copy of the order with notice of entry, a copy of which is annexed in the appendix herein.

REASONS FOR GRANTING THE WRIT

THE INTERPRETATION GIVEN BY THE NYSRWB OF THE TRAINER'S RESPONSIBILITY RULE IS IN VARIANCE WITH THE DECISION OF THE SUPREME COURT IN BARRY V. BARCHI, 443 U.S. 55 (1979) AND IS SO IRRATICNAL AS TO VIOLATE THE BASIC TENETS OF DUE PROCESS OF LAW.

The State's interest in upholding the integrity of horse racing, an important source of public revenue, has given rise to the trainer's responsibility rule, embodied in New York State in Rule 4120.6 of the Rules of the NYSRWB, providing that, "A trainer shall be responsible at all times for the condition of all horses trained by him." To enforce the administrative rule of liability, Rule 4120.5 creates a series of regulatory presumptions:

> "Whenever the test or tests prescribed in section 4120.1 hereof disclose the presence in any horse of any drug, stimulant, depressant or sedative, in any amount whatsoever, it shall be presumed:
>
> (a) that the same was administered by a person or persons having the control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated;
>
> (b) that it was administered within the period (forty eight hours) prohibited by subdivision (3) of section 4120.4 of this Part; and
>
> (c) that a sufficient quantity was administered to affect the speed of such animal."

The regulatory presumptions, as well as the basic trainers' responsibility rule, read together, have been interpreted as to create a strong inference that medication administered to a horse within forty eight hours of a race, has resulted from the negligent or wilfull act of the trainer, responsible for the custody of the animal. Quite expectedly, the rule has been the subject of numerous court challenges on grounds that the presumption creates an irrational inference, from the fact proven. Several high state courts have held that there is no rational connection between the fact proven, to wit, the medicating of a horse within forty eight hours of a race, and the fact to be inferred, that it resulted from the wilful act or negligence of the trainer, and declared the rule to be Unconstitutional. *State ex rel Paoli v. Baldwin,* 159 Fla. 165 (1947); *Mahoney v. Byers,* 187 Md. Repr. 81 (1946); *Brennan v. Illinois Racing Board,* 42 Ill. 2d 352 (1969). Other States have held that there is a rational connection between the fact to be inferred from the fact proven, and upheld the rule. *Jamison v. State Racing Comm.* 84 N.M. 679 (1973); *Sandstrom v. California Horse Racing Board,* 31 Cal. 2d 401 (1948).

The inevitable challenge to the Constitutionality of the harsh near-insurer liability imposed by the uniform regulation, ultimately arrived at the Supreme Court. *Barry v. Barchi,* 443 U.S. 55 (1979). In upholding the trainer's responsibility rule, the Court wrote:

> "A trainer is forbidden to permit a horse in his custody to start a race 'if he knows, or by the exercise of reasonable care he might have known or have cause to believe' that a horse trained by him has been drugged."

However, the *Barchi* case, basically turned on the failure to afford the licensee a pre-suspension hearing, and therefore, the Court did not have occasion to apply the trainer's responsibility rule to any developed factual pattern. However, in the Court below, *sub nom, Barchi v. Sarafan,* 436 F. Supp. 775 (S.D.N.Y., 1977), wrote, by reason of the failure to develop the facts at a hearing:

> "Whether the application of the rules in plaintiff's case was constitutionally proper is not a matter we need consider in light of the absence of an opportunity for meaningful administrative review."

The trainer's responsibility rule creates an inference that the person having custody of a horse was guilty of either a negligent or wilful act, where post race test reflects that he had been administered a substance, the ingestion of which within forty eight hours of the race is prohibited. However, such responsibility acrues, where the trainer authorizes his horse to participate in a race, which has been so medicated. *Rule 4120.6, supra.* The rule should be inapplicable, unless a trainer authorizes a horse, medicated within forty eight hours of the race, to "start a horse or permit a horse in his custody to be started if he knows, or if by the exercise of reasonable care he might have known or have cause to believe, that the horse has received any drug, stimuland, sedative, depressant, medicine, or other substance that could result in a positive test." *Rule 4120.6, supra.* Where there is no rational connection between the fact to be proven and the fact to be inferred, the inference required to be drawn runs afoul of the Fourteenth Amendment to the Constitution. *United States v. Gainey,* 380 U.S. 63 (1965). To allow an inference of liability to be created,

without any rational basis therefore is beyond the jurisdiction of any legislative created body. *Manley v. Georgia*, 279 U.S. 1 (1929). A statutory presumption may not be created to punish without evidence of guilt. *Seales v. United States*, 367 U.S. 203 (1961). Where an effort is made to impose sanctions, there must be some rational basis for fixing such responsibility. *Tot v. United States*, 319 U.S. 463 (1943). The irrationality of the administrative process creates a cognizable Constitutional issue. *Vlandis v. Kline*, 412 U.S. 441 (1973).

At the hearing, it was developed, without dispute, that upon being informed that the less sensitive blood test had revealed that the sample drawn from the horse contained a foreign substance, rather than chance conflict with the trainer's responsibility rule, JEAN DROLET, the horse's owner, requested that it be scratched from the race. WILLIAM MARA, the house investigator for the NYSRWB, was reluctant to allow the horse to be scratched and ordered that it compete. Respondent offered the explanation that such scratching of the animal from the race would have lead to disruption in the racing program. Thus, the record stands without contradiction that it was an agent of respondent, not petitioner, who insisted that the horse compete. It is therefore respectfully submitted that under the circumstances, it was not petitioner who caused Golden Opportunity to race, but the designated agent of respondent, and therefore, application of the trainer's responsibility rule, was in violation of the Fourteenth Amendment. The argument raised by respondent that to allow a horse to be withdrawn from the race at the eleventh hour would disrupt the program, reflects official concern for the welfare of the track owner, but indifference to the health of the animal and the integrity of the racing,

despite respondent's role as a public guardian. It is respectfully submitted that this Court merely tasted, without digesting the trainer's responsibility rule in *Barry v. Barchi, supra,* and therefore, certiorari should be granted, for a more in depth consideration of the trainer's responsibility rule, which has far reaching and important application nationally. It should not be permitted to be applied, consistent with due process, where, the horse is entered in a race over the trainer's objection, by fiat of State agents of the NYSRWB.

Respectfully submitted,

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APPENDIX A

ORDER OF COURT OF APPEALS, STATE OF NEW YORK, WITH NOTICE OF ENTRY

COURT OF APPEALS
STATE OF NEW YORK

Index No. 27579/82 (New York County)

CLAUDE DROLET,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

JOHN VAN LINDT, as Chairman, JOSEPH O'DEA and BERTRAM D. SARAFAN, as Members of the New York State Racing and Wagering Board, Division of Harness Racing,

Respondents.

SIR:

PLEASE TAKE NOTICE that the within is a true copy of an Order duly filed and entered in the office of the Clerk of the Court of Appeals on or about March 30, 1983.

Dated: New York, New York
April 7, 1983

Yours, etc.,

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Respondents

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty day of March A.D. 1983

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

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1 Mo. No. 236
In the Matter of the Application of Claude Drolet,
Appellant,

For an Order &c.

vs.

John Van Lindt, as Chairman, and Joseph O'Dea and Bertram D. Sarafan, as Members of the New York State Racing & Wagering Board, Division of Harness Racing,

Respondents.

A motion for leave to appeal to the Court of Appeals &c. in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

APPENDIX B

ORDER OF THE APPELLATE DIVISION FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 10, 1983

Present—Hon. Leonard H. Sandler, Justice Presiding
Joseph P. Sullivan
John Carro
Samuel J. Silverman
Max Bloom, Justices.

In the Matter of the Application of Claude Drolet,

Petitioner,

For an Order Pursuant to Article 78 of the CPLR,

-against-

John Van Lindt, as Chairman, Joseph O'Dea and Bertram D. Sarafan, as Members of the New York State Racing and Wagering Board, Division of Harness Racing,

Respondents.

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The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondents dated November 18, 1982, which suspended petitioner's harness racing license for one year,

And this proceeding having been transferred by order of said court, entered on December 1, 1982 (S. Schwartz, J.), to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Joseph A. Faraldo of counsel for the petitioner, and by Abigail I. Petersen of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondents be and the same hereby is confirmed, without costs and without disbursements. The Clerk is directed to enter judgment in favor of respondents, confirming the determination.

ENTER:
NORMAN GOODMAN
Clerk.

APPENDIX C
NOTICE OF SUSPENSION AND HEARING

NEW YORK STATE RACING AND WAGERING BOARD

IN RE: CLAUDE A. DROLET
LICENSE NO. 6330

PLEASE TAKE NOTICE that your license to participate in harness racing is SUSPENDED immediately pending the within scheduled hearing and determination by the Board or if you refuse such hearing until such time as the Board, in its discretion, takes such other and further action.

You are further notified that the hearing in this matter will be held on the 23rd day of July, 1982 at 10:30 a.m. at the offices of the Racing and Wagering Board, Two World Trade Center, New York, New York, 74th floor, at which time you may be represented by counsel and present evidence and arguments in your own behalf.

This action is taken pursuant to Sections 41a and 43 of Chapter 254 of the Laws of 1940 respectively, codified at Unconsolidated Laws Section 8010 and 8022, 9 NYCRR Sections 4120.4, 4120.5 and 4120.6 and subdivision 3 of Section 401 of the State Administrative Procedure Act, upon a finding by the Board on July 20, 1982 that the public's welfare imperatively requires the emergency action of your immediate suspension based upon the circumstances set forth more particularly as follows:

that the horse GOLDEN OPPORTUNITY, trained by you, raced in the third (3rd) race at Yonkers Raceway on June 30, 1982 with the drug CLENBUTEROL, a respiratory stimulant, in its system and further, that this drug had been administered to the horse within forty-eight (48) hours prior to its race for which you are responsible, all in violation of 9 NYCRR Section 4120.4 subdivisions (a) and (d); that the drug CLENBUTEROL is not approved in the United States by the Federal Drug Administration for use in either animals or man.

During the period of suspension you are denied the privileges of the grounds. No horse owned or trained by you will be permitted to race at any New York State track conducting para-mutuel racing.

s/ Thomas C. Davide
THOMAS C. DAVIDE
Secretary to the Board

DATED: NEW YORK, NEW YORK
JULY 20, 1982

TO: CLAUDE A. DROLET
11 W. Walnut Street
Farmingdale, NY 11735

CLAUDE A. DROLET
c/o Yonkers Racing Corporation
Yonkers, NY 10704

APPENDIX D
RESPONDENTS' DETERMINATION ("FINDINGS AND ORDER")

NEW YORK STATE RACING AND WAGERING BOARD DIVISION OF HARNESS RACING

IN THE MATTER OF
CLAUDE DROLET
S.S. NO.: 042-60-3126
D/O/B: 7/27/42

Upon the Notice of Suspension and Hearing dated July 20, 1982 and the charges contained therein and upon the hearing in this matter conducted on July 29, July 30, October 19 and October 21, 1982 and all the testimony and evidence adduced thereat and upon the Report of Hearing Officer, Bertram D. Sarafan, dated November 15, 1982, annexed hereto and incorporated herein, the Board finds as follows:

1. The horse, GOLDEN OPPORTUNITY, trained by Claude Drolet, raced in the third race at Yonkers Raceway on June 30, 1982 with the drug Clenbuterol in its system.

2. The drug Clenbuterol is a powerful respiratory stimulant which can affect the breathing capacity of a horse. Clenbuterol is not approved in the United States for use in either man or animals. Its use in the United States is limited to restricted clinical investigations authorized by the Food and Drug Administration.

3. The drug Clenbuterol was administered to the horse GOLDEN OPPORTUNITY prior to its race at Yonkers Raceway on June 30, 1982 by its trainer, Claude Drolet.

4. The drug Clenbuterol was administered to the horse GOLDEN OPPORTUNITY within forty-eight (48) hours of its race at Yonkers Raceway on June 30, 1982.

5. The aforesaid constituted a serious violation of the Board's rules, specifically 9 NYCRR §4120.4 subsections (a) and (d) and §4120.6.

Accordingly, it is hereby ORDERED that the harness racing license of CLAUDE DROLET be suspended for a period of one (1) year running from the original date of suspension, July 20, 1982 through July 19, 1983. During this period of suspension he shall be denied the privileges of the grounds.

NEW YORK STATE RACING
& WAGERING BOARD
s/ Thomas C. Davide
THOMAS C. DAVIDE
Secretary to the Board

DATED: NEW YORK, NEW YORK
NOVEMBER 18, 1982

APPENDIX E

RESPONDENTS' REPORT OF HEARING OFFICER (ADOPTED IN THE "FINDINGS AND ORDER")

NEW YORK STATE RACING AND WAGERING BOARD DIVISION OF HARNESS RACING

In the Matter
of
CLAUDE A. DROLET

This was a hearing to review the Board's summary suspension on July 20, 1982, by order of same date, of the license of Claude A. Drolet to participate in harness racing pending the outcome of a hearing scheduled for July 23, 1982. The summary suspension* was based upon the Board's finding, incorporated in its order of July 20, 1982, that the public health, safety and welfare imperatively required such emergency action, in that the horse "Golden Opportunity", trained by Claude A. Drolet, had raced in the third race at Yonkers Raceway on June 30, 1982 with the drug Clenbuterol, a respiratory stimulant, in its system, that the drug had been administered within 48 hours prior to the race, and that the drug had not been approved for use in the United States in either animals or man by the Federal Food and Drug Administration. Respondent's brother Jean Drolet was the owner of the stable in which "Golden Opportunity" was registered on the date of the race.

The hearing herein was held before the undersign-

*Respondent's efforts to stay the summary suspension were unsuccessful. *Drolet v. NYSRWB*, Supreme Court, Nassau County, Special Term, Part I (July 26, 1982) and Appellate Division, 2nd Dept. (August 19, 1982).

ed sitting as hearing officer on July 29th, July 30th, October 19th and October 21st, 1982. The respondent was represented by Joseph Faraldo (Marvyn Kornberg, of counsel); the Board was represented by David Vaughan, Assistant Counsel (Salvatore R. Curiale, Counsel, and Robert Feuerstein, Assistant Counsel, represented the Board on procedural and legal questions).

Clenbuterol is a newly developed drug manufactured in West Germany by Boehringer-Ingelheim Ltd. It is an extremely potent bronchospas-molytic agent designed, clinically, for the treatment in animals of bronchitis, emphysema, bronchopneumonia, etc. according to dosages recommended by the manufacturer. Its mechanism of action is that of a typical beta-stimulant (stimulates selectively the beta-2 receptors of the automatic nervous system) causing dilation of the bronchi and increased secretions of certain cells of the respiratory system, resulting in a decreased resistance to the flow of air in the lungs and thus an improvement in the breathing of an animal suffering from a pulmonary disease. Its use in a normal animal (no pulmonary disease) likewise increases the air flow in the lungs and can be a significant aid in the performance of a race horse. As stated above, it may not legally be sold, distributed or used in the United States at present except in highly restricted clinical investigations authorized by the F.D.A.

In 1980, the Board received information that Clenbuterol was being smuggled into this country from West Germany and was being administered to horses racing in New York. George A. Maylin, D.V.M., Ph.D. (pharmacology), Associate Professor of Toxicology at Cornell University, School of

Veterinary Medicine and Director of the Board's Drug Testing and Research Program, started work on developing an effective test for detecting Clenbuterol in post-race urine samples. (No such test existed at the time in the New York program. An added difficulty, if rumor was correct, was the fact that the drug was being administered in doses smaller than the dosages recommended in cases of pulmonary disorders and thus was escaping detection as a foreign substance in established blood and urine tests.) In this work, Dr. Maylin was assisted by Boehringer-Ingleheim Ltd. which supplied data and certified samples of the drug. Towards the end of May 1982, Dr. Maylin was close to perfecting an effective test for the detection of Clenbuterol in post-race urine samples. At that time the Board directed that the residue of urine samples (the remainder after other tests) be frozen and forwarded to the Central Laboratory at Cornell for eventual testing for Clenbuterol. Since the track-side laboratories did not possess an effective test for the drug as of July 1, 1982, the urine sample in this case was frozen and forwarded to the Cornell Laboratory for eventual testing for Clenbuterol in accordance with the Board's directive.

During July 1982 (the tests having been perfected) a number of "positives" for Clenbuterol were reported by the Cornell Laboratory. Among the positives so reported was that of "Golden Opportunity" after its race at Yonkers Raceway on June 30, 1982.

At the hearing herein the following witnesses testified on behalf of the Board: Paul Paolicelli, an Inspector who was assigned to obtain the post-race urine sample from "Golden Opportunity" on June 30,

1982; Gerard Meenan, M.Sc., Director of the track-side laboratory at Yonkers Raceway, operated by Cornell University; Jack Henion M.Sc., Ph. D. (analytical organic chemistry), Assistant Professor of Toxicology, Cornell University, Chief Chemist of the Board's Drug Testing and Research Program; and Dr. George A. Maylin (whose credentials and positions are set forth above).

The above witnesses testified in detail to the taking of the post-race urine sample, its containment in a capped, sealed and numbered container, its storage in a refrigerator in the Board Veterinarian's office, its subsequent testing for drugs at the track-side laboratory (none detected), the transmittal of the residue to the laboratory at Cornell University, the testing of the sample at Cornell and the identification of the drug Clenbuterol in the sample. The respondent's counsel indulged in extensive cross-examination, including examination of all related records and documents, in an apparent effort to prove that the sample may have been that of another horse or that someone may have added the drug to the sample after it had been taken. However, he offered no evidence in support of either contention. On the other hand, the Board's proof overwhelmingly established that the urine sample taken from "Golden Opportunity" after its race on June 30, 1982 did contain the drug Clenbuterol, that the drug was a pulmonary stimulant which could have affected the horse's performance, and that it had been administered to the horse between 12 and 23 hours before collection.

Dr. Henion, under whose supervision the testing at Cornell was conducted and who participated in the testing, described in detail the scientific processes us-

ed, known as thin layer chromatography and gas chromatography mass spectrometry (GCMS). The comparison of the results with standards from a known sample confirmed unequivocally the existence of the drug in the sample. In Dr. Henion's expert opinion, based on experiments conducted at Cornell, the drug in this case had been administered within 12 hours of the taking of the sample. Dr. Maylin, whose testimony was devoted primarily to the pharmacological effect of the drug, also was of the opinion that the drug had been administered within 12 hours of collection, but in no event more than 23 hours before collection.

Both Claude A. Drolet, the respondent, and Jean Drolet, were called to testify by the Board's counsel during the Board's case. Both declined to answer any questions citing their constitutional privileges under the Fifth Amendment.* However, they both did testify on the last day of the hearing, as will be outlined below.

The only other witness produced by the respondent was one Ann Schwink, D.M.V. and M. Sc. (veterinary pathology), employed by Phillips-Roxanne, Inc. (located in Missouri), a subsidiary of Boehringer-Ingelheim, Ltd., the manufacturer of Clenbuterol. Dr. Schwink testified that a carbon-14 test employed by her firm (on bovines, not horses) had enabled the detection of Clenbuterol up to 240 hours. The purpose of the testimony was to negate the proof

*Jean Drolet also claimed he wanted to confer with a lawyer, indicating his brother's lawyers were not also his.

presented by the Board that the drug had been administered between 12 and 23 hours (testimony of Drs. Henion and Maylin), and so not within the 48 hours proscribed by *Rule 4120.4(d)*.

The test described by Dr. Schwink is extremely sensitive and capable of detecting minute quantities. It entails attaching a radioactive element to the drug before administration. The Cornell test is not as sensitive; it is designed to detect pharmacologically effective amounts by available and feasible procedures. Obviously, the drugs used at the tracks, especially those used illegally, cannot be tagged with a radioactive element before administration. The carbon-14 test in no way lessens the validity of the Cornell test. Dr. Schwink was not familiar with the procedures employed by Cornell and her knowledge of the results obtained by Phillips-Roxanne was gleaned primarily from their files.

The principal witness for the respondent was his brother Jean Drolet, the owner of the stable. (As stated above, he and the respondent had refused to testify initially when called by the Board, but both testified voluntarily, on the respondent's case).

The substance of Jean Drolet's testimony is set forth in the following seven paragraphs:

(1) He has been licensed as an owner and trainer of harness horses in several sttes, including New York, and in Canada for about a dozen years. During 1982 he owned and raced about 35 to 50 horses stabled in New York, Florida and New Jersey and divided his time between the three areas. His brother Claude was the trainer of the horses racing at Roosevelt and Yonkers.

(2) About six months ago, in a bar in Florida near Pompano Race Track, a stranger introduced himself as "Woody Kinsbrunner" a salesman of horse care products (food supplements, alcohol, bandages, etc.) representing the "Dr. Kaye Horse Care Products" (so read his business card) of Hallandale, Florida. (Jean understood Kinsbrunner and Kaye were not the same person.) They arranged to meet the next morning at the track kitchen to talk business.

(3) They met, as arranged, and discussed products and prices and Kinsbrunner told Drolet to order by phone using the number on his business card. At the time Kinsbrunner told him of a new product known as "Ventipulmin," which he represented as a food supplement (a white powder to be added to the horse's feed twice daily in a measured amount) which would cut down on veterinarian's bills by reducing or eliminating the need for "jugging" (administering electrolytes hypodermically). Kinsbrunner said the product was in big demand since trainers had had a lot of success with it. Drolet did not order anything at the time.

(4) Some time afterwards, from New York, Drolet ordered, by phone, one can of Ventipulmin from Dr. Kaye, plus other items. He received the package about three weeks prior to the race in question. He had ordered only one can because the product was very expensive and he wanted to try it out. At the time he had about fifteen horses at Roosevelt and Yonkers under his brother Claude's supervision. He gave the can to Claude, saying it was a food supplement and, since it was very expensive, it should be used on only one horse, in good condition, in the feed twice a day (a small measuring cup came in the can) to see if it did do

the horse good and did cut down on the veterinarian's bills. Inside the can was a folded sheet of instructions (Exh. L) but it was printed in German, not understandable to Jean. Claude chose "Golden Opportunity" for the experiment but Jean claims he did not know the identity of the chosen horse until later when the positive was reported by the laboratory.

(5) On the night of June 30th, Jean was in the paddock with "Golden Opportunity" (Claude was not at Yonkers) preparatory to the race. Shortly before the horse was due to go into the track an official, one Mara, informed Jean that the first blood test had not passed, that another sample of blood had been taken, and the results of the second test were being awaited. Jean replied that rather than have complications he would prefer to have the horse scratched. A short time later he repeated his request to scratch the horse but Mara refused saying they must await the results of the second test. Finally, shortly before the start (the other horses were on the track), Mara informed Jean that the second blood test had proven negative and that the horse must race.*

(6) The next day Jean, referring to the first blood test, told Claude "It must be something they're pick-

*Blood tests are not as "sensitive" generally as urine tests in horses. Apparently in this case, an initial pre-race blood test gave some indication that a foreign substance might be present, however, a second blood test was negative. It should be noted that, at that time and continuing to the present, the testing lab did not have a blood test which could detect Clenbuterol, so that it was not the presence of that drug that caused the initial "suspicious" blood test. In any event, since the second pre-race blood test was negative, the horse was not scratched.

ing up." They then realized the only thing different with this horse was the Ventipulmin. Jean gave the instruction sheet to one of his owners, a Kurt Thiele, who could read German. Thiele expressed surprise that the Drolets were using this product saying that in Germany it was used for pregnant women about to give birth. Besides, the product had not produced any improvement in the horse's performance on June 30th (compared to its prior performance on June 15th when it had not received Ventipulmin). The last time it was used by the Drolets was about 50 hours before the race of June 30th. In the period between June 15th and June 30th the horse had not had any respiratory disorder.

(7) Two or three weeks after the race of June 30th, Jean heard the word "Clenbuterol" for the first time from the Board's investigator Kelleher* who informed him that the laboratory had reported a positive (post-race urine sample) of Clenbuterol Hydrochloride. Jean and Claude examined the instruction sheet (Exh. L) again and saw "Clenbuterolhydrochlorid" (the German word). Thus they learned that Clenbuterol was another name for Ventipulmin.

* * *

The instruction sheet (Exh. L) is entitled "Ventipulmin" in large print. The text of the first paragraph (only three lines) contains the phrase "0.018 mg Clenbuterolchydrochlorid." The second paragraph (five lines) contains the German words "Bronchospasmen," "Bronchitis" and

*Kelleher died during the period of the hearing and his testimony is not part of the record.

"Bronchiolitis" (the latter two being the same in English and the first little different from the English "Bronchospasm"). The paragraph ends with quoted terminology *in English:* " 'Chronic obstructive pulmonary disease' (COPD)."

It is difficult to understand how a person with Jean's experience could not have been put on notice, by even a glance at the instruction sheet, of the true nature of the product.

Additional details, destructive of Jean's explanation, were elicited on cross-examination. The cost of Ventipulmin as quoted by Kinsbrunner was about five times more expensive (about $100 for the canister) than a comparable quantity of branded food supplements sold by the several supply stores at which Jean dealt. Yet he did not inquire at any store as to whether the product was available and its cost. He did not discuss its use with either of the two veterinarians who had been servicing his horse for a number of years. He did not ask Thiele, the German, to translate or summarize the instruction sheet prior to using the product. In fact, he did not discuss the use of the product with anyone in the business except his brother Claude and then only to give him instructions on its administration.

It also strains credulity that Jean did not suspect Ventipulmin as a problem until after Kellcher had reported the laboratory report of the positive (post-race urine test) and until after he and his brother examined the instruction sheet more carefully. Thiele had previously expressed his surprise that Jean had used the product and, according to Jean's version of the conversation, there was no mention of pulmonary

disorders. Concerning his conversations with Kelleher, Jean could not remember if he had told Kelleher that they had been feeding the horse a white powder, or whether Kelleher had asked how close to the race the product had been administered, or if Kelleher had, in fact, asked the latter question, whether he would have given an answer since he had not seen the feeding at any time. The episode with Mara in the paddock admittedly caused concern of an eventual post-race positive and yet, Jean claims, he did not yet suspect the white powder and so made no mention of it to Mara.

In summary, I disbelieve the explanation proferred by Jean and believe he operated, as did other horsemen, on the assumption (correct until sometime in July 1982) that there was no test for Clenbuterol in New York.

Claude Drolet's testimony was brief and confirmatory of Jean's. He has been licensed as a trainer in New York and Canada for several years and is in charge of his brother Jean's stable at Roosevelt and Yonkers. Jean gave him the can of white powder, telling him it was a food supplement and instructing him on the feeding, in order to find out if it was a good product and would cut down on the veterinarian's bills. He gave it only to "Golden Opportunity" because it was the soundest horse in the stable. He kept the can locked up, as he did all medications, so that no one else could use it. He started the feeding about 15 days before the race of Wednesday, June 30th and stopped on Monday, June 28th.

On cross-examination he testified he had not asked his brother where the latter had obtained the can,

or what he had paid for it. Although he himself opened the can, and handled it twice daily for about two weeks, when he personally fed the powder to the horse, he did not look at the label and did not notice if it was written in another language. Like Jean, he did not discuss the product with any third person, not even the two veterinarians who treated the stable horses and whom he saw every day. Following "Golden Opportunity's" race of June 15th, the veterinarians administered electrolytes and probably Butezolidin, according to Claude, leaving one to wonder how effective the "experiment" with Ventipulmin could be immediately following the veterinarians' administration.

Finally, asked if he had ever been convicted of a crime, Claude answered, "A small larceny," to which his counsel specified "Petty larceny." Asked how much was involved in the larceny, Claude replied, "I wouldn't answer that. Everything is on my record." His license file contains a Record of Conviction ("Declaration of Culpabilite") from the Province of Quebec, District of Quebec, which recites that Claude Drolet on April 11, 1974, in the Court of Session of the Peace was found guilty, after trial, of stealing $40,000, the property of Canadian General Electric, over a period from 1969 to 1971, and was sentenced to two years imprisonment. (He testified he was released after serving six months).

In my judgment, Claude is no more worthy of belief than is his brother Jean. In particular, in view of the testimony of Dr. Henion and Dr. Maylin, I disbelieve Claude's assertion that he last fed the ohrse Ventipulmin on Monday, June 28th, and accept their opinion that it was fed between 12 and 23 hours before

the race.

In my judgment, the evidence clearly establishes that the horse "Golden Opportunity" participated in the 3rd race of June 30, 1982 at Yonkers Raceway with the drug Clenbuterol, a pulmonary stimulant, in its body and that, in connection therewith, the respondent Claude A. Drolet acted in violation of *Rule 4120.4(a) and (d)* and *Rule 4120.6.* These conclusions are based on the evidence adduced herein and are buttressed by the presumptions contained in *Rule 4120.5.* (The foregoing rules, as in effect on June 30, 1982, are applicable).

I recommend that the Board impose a penalty appropriate to the circumstances herein.

s/Bertram D. Sarafan
BERTRAM D. SARAFAN
Hearing Officer

Dated: November 15, 1982

No. 82-1677

Office-Supreme Court, U.S.
FILED
MAY 16 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1982

CLAUDE DROLET,

Petitioner,

v.

JOHN VAN LINDT, as Chairman, and JOSEPH O'DEA and BERTRAM D. SARAFAN, as Members of the New York State Racing and Wagering Board, Division of Harness Racing,

Respondents.

On Petition For a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the confirmance by the Appellate Division of the New York State Supreme Court of the New York State Racing and Wagering Board's suspension of a trainer's license after a hearing found that the trainer was responsible for the administration of a stimulatory drug to a horse within forty-eight hours prior to its race presents a substantial constitutional question warranting this Court to grant certiorari?

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On Petition For a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Van Lindt, O'Dea and Sarafan, as members of the New York State Racing and Wagering Board ("Board") respectfully request the Court to deny the petition for a writ of certiorari to review the unanimous confirmance, without opinion, of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department. (A copy of the Appellate Division Order is annexed to the Petition for a Writ of Certiorari as Appendix B)

Statement of the Case

On July 20, 1982 the Board summarily suspended petitioner's harness horse racing license after it was determined that a horse trained by petitioner had been administered the drug Clenbuterol within forty-eight hours before its race and had raced with the drug in its system, in violation of Board Rules 9 New York Code of Rules and Regulations ("N.Y.C.R.R.") §§ 4120.4(a) and (d)* and 4120.6.** Clenbuterol is a powerful respiratory stimulant which is not approved by the Food and Drug Administration for use in the United States in animal or man. It may not be legally sold in the United States. Petitioner's license was suspended pending a hearing and determination of the issues by the Board.

A hearing upon the charges was held on July 29 and 30, August 2 and October 19 and 20, 1982 before Hon. Bertram D. Sarafan, a member of the Board designated as hearing officer. Petitioner was afforded a full opportunity to testify and was represented by counsel. The hearing officer's find-

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* Board Rule 9 N.Y.C.R.R. ("Board Rule") § 4120.4 entitled "Prohibition" has two separate subsections which relate to the administration of drugs. It provides as follows:

> "Prohibition. No person shall, or attempt to, or shall conspire with another or others to:
>
> (a) Stimulate or depress a horse through the administration of any drug, medication, stimulant, depressant hypnotic or narcotic
>
> * * *
>
> (d) Administer any drug, medicant, stimulant, depressant, narcotic or hypnotic to a horse within 48 hours of its race." *Id.*

It should be noted that the foregoing rule was substantially modified, effective July 1, 1982.

** Board Rule § 4120.6, entitled "Trainers' responsibility" is quoted in the Petition at 2-3.

ings and conclusions, later adopted by the Board, were set forth in detail in a fourteen-page Report of Hearing Officer dated November 15, 1982. (A copy of the Report of Hearing Officer is annexed to the Petition for a Writ of Certiorari as Appendix E.) (References to pages of the Report appear here as "H. Rep.")

The hearing officer found that petitioner had administered a potent respiratory stimulant, Clenbuterol, to his horse within forty-eight hours before its race, and that the horse raced with the drug in its system in violation of Board Rules 9 N.Y.C.R.R. §§ 4120.4(a) and (d) and 4120.6. (H. Rep. 21a-22a)

The hearing officer carefully weighed all of the evidence presented and based his decision on that evidence. The evidence showed that the drug was purchased illegally, that it was administered by petitioner to his horse, that the horse raced with the drug in its system, and that it had been administered within forty-eight hours before the horse's race.

The evidence considered by the hearing officer included the eventual admissions of petitioner and his brother relating to the purchase of the drug and its use. He considered the testimony of Dr. Jack Henion and Dr. George Maylin of Cornell University regarding the identification of the Clenbuterol in the horse's urine, the development of the tests for Clenbuterol, the nature of the drug and their expert opinions on the time of its administration.

The hearing officer concluded that petitioner had violated both subsections (a) and (d) of Board Rule § 4120.4

and § 4120.6 as charged and recommended that the Board impose an appropriate penalty. (H. Rep. 22a)

On November 18, 1982, the Board adopted the Report of the Hearing Officer and concluded that petitioner's administration of the powerful respiratory stimulant, Clenbuterol, to his horse within forty-eight hours before its race constituted a serious violation of the foregoing Board Rules. Accordingly, the Board suspended petitioner's license for one year from July 20, 1982 (the original date of the suspension) through July 19, 1983.

Petitioner then commenced a special proceeding on November 24, 1982, which was transferred to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department. By Order, dated February 10, 1983, the Appellate Division, without opinion, unanimously confirmed the Board's determination and dismissed the proceeding. Petitioner then filed a motion for leave to appeal to the New York State Court of Appeals. By Order dated March 30, 1983, the Court of Appeals, without opinion, denied petitioner's motion for leave to appeal. On or about April 12, 1983, petitioner filed the instant petition for a writ of certiorari in this Court.*

Reasons for Denying the Writ

This case fails to present any novel or important question of law. Petitioner has not demonstrated that the pur-

* This petition represents the latest of petitioner's attempts to extend a stay originally granted at the beginning of the proceeding. His numerous applications for a further stay, made since he filed the instant petition, have been uniformly rejected by the Supreme Court, New York County and by the Appellate Division, First Department.

ported questions of law he raises meet any of the jurisdictional criteria governing review on certiorari set forth in 28 U.S.C. § 1257 or in Rule 17 of the Rules of the United States Supreme Court.

By this petition for a writ of certiorari, petitioner seeks to have this Court review a factual determination made by the New York State Racing and Wagering Board and confirmed by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department. Since the jurisdiction of this Court does not extend to the review of such questions, this petition is improper and should be denied.

It is well-settled that this Court will not exercise its jurisdiction merely to review a decision of a state court upon a question of fact. *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925); *Portland R. Co.* v. *Railroad Commission*, 229 U.S. 397, 412 (1913). Although this Court will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," *Fiske* v. *Kansas*, 274 U.S. 380, 385-86 (1927), this case does not fall within either of the foregoing exceptions.

Petitioner frames the main question presented as being whether the Appellate Division, by its confirmance without opinion of the New York State agency's decision, misconstrued the Trainer's Responsibility Rule, and did so in violation of petitioner's Fourteenth Amendment due proc-

ess rights.* (Petition at i) However, this is the first time that petitioner has attempted to raise a constitutional question.** It is axiomatic that this Court does not address constitutional questions which were not presented to and decided by the state court below. *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969).

The real issue raised by this case is one of fact, not of law, and hence should not be reviewed by this Court. *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925). The Board adopted the Hearing Officer's findings that petitioner administered the drug, Clenbuterol, to his horse and did so within forty-eight hours before its race, in violation of Board Rules §§ 4120.4(a) *and* (d), and the Trainer's Responsibility Rule. Petitioner seeks to create the impression that the Board's determination was based wholly upon his violation of the Trainer's Responsibility Rule. It is important to note that while the Board, in the proper exercise of its discretion, could well have based its determination on this violation alone, in point of fact its determination was also based upon several other serious violations of the Board's rules, cited above and in the Report of the Hearing Officer. (H. Rep. at 22a)

With regard to the Trainer's Responsibility Rule, the Board adopted the Hearing Officer's finding that "[i]t is difficult to understand how a person with [petitioner's] ex-

* The Trainer's Responsibility rule is contained in 9 N.Y.C.R.R. § 4120.6 and is quoted in the instant Petition at 2-3.

** Petitioner also attempts to raise, albeit in vague fashion, several other purported constitutional issues for the first time. (Petition at 7-9)

perience could not have been put on notice, by even a glance at the instruction sheet, of the true nature of the product." (H. Rep. at 19a) The hearing officer found petitioner's testimony regarding his belief the substance was a "food supplement" to be totally improbable. (H. Rep. 19a-21a) As the record indicates, and the hearing officer notes, at the very least, petitioner, "by the exercise of reasonable care . . . might have known or have cause to believe" that the substance he gave to his horse "could result in a positive test." (Board Rule § 4120.6, H. Rep. at 19a-21a) These factual findings, *inter alia*, were confirmed by the Appellate Division when it found that there was substantial evidence in the record to support the Board's determination.

The importance of these factual findings is emphasized by the language of the Trainer's Responsibility Rule. (Petition at 2-3) By virtue of the fact petitioner knew, or, at the very least, "by the exercise of reasonable care . . . might have known or have cause to believe" that the substance he gave to his horse "could result in a positive test", 9 N.Y.C.R.R. § 4120.6, he was in violation of the Trainer's Responsibility Rule. Thus, there exists no question of law which can be reached by this Court without reviewing and reversing these factual determinations, which, as the Appellate Division found, were overwhelmingly supported by substantial evidence in the record.

Petitioner places great emphasis on his continued erroneous contention that the Board knew of the presence of the drug in his horse prior to its race by virtue of a pre-race blood test and, in spite of this, forced petitioner to race the horse against his will. (Petition at 9) It is uncontroverted that the pre-race blood test of petitioner's

horse (which consisted of two blood samples) was negative. As a result, the track judges had no reason to "scratch" petitioner's horse. 9 N.Y.C.R.R. § 4120.12(g).* Petitioner's argument that he was forced to race his horse was considered and properly rejected by both the Board and the reviewing court below.

It is important to note that petitioner's focus on the participation of his horse in the race is also misplaced. He violated the Trainer's Responsibility Rule, along with two other Board rules, § 4120.4(a) and (d), well before the actual running of the race. Specifically, he violated these rules when he began and continued to administer the respiratory stimulant to the horse throughout the period before, and in connection with, the race, and within forty-eight hours before its race. Under the circumstances, petitioner violated the Board rules irrespective of the horse's participation in the race and scratching the horse would not have cured those violations.

The Board is charged with the regulatory responsibility for the racing industry which is highly sensitive in nature since it is the only sport in New York upon which wagering may be legally conducted. Petitioner's violations are anathema to racing and highly prejudicial to the best interests of racing. As this Court has recognized, the Board has a paramount interest in assuring the integrity of the racing carried on under its auspices. *Barry* v. *Barchi*, 443

* A horse may be withdrawn for a bona fide reason—one which did not exist in the instant case. Petitioner's statement to track officials that "rather than have any complications I would rather have horse scratched or whatever" does not constitute a bona fide reason to remove a horse from a race. Had he been forthright and admitted his horse's drugged state, it is highly likely the horse would have been withdrawn.

U.S. 55, 64 (1979). It is therefore essential for the Board to be able to act swiftly and appropriately, as it did here, to prevent abuse and loss of public confidence.

As demonstrated by the Appellate Division's unanimous decision, and the papers here, the administrative decision was based upon substantial evidence, the penalty imposed was authorized by law, and petitioner's contentions are patently frivolous and unsupported by the facts presented.

Moreover, the questions proposed by petitioner, even if properly subject to review, do not merit such review. Other than vague generalizations, petitioner has not pointed to any particular aspect of this case which is of importance, either to the public in general or to those who participate in harness racing. Petitioner's mistaken contention that his attempt to remove his horse from the race somehow exonerates him is based, at best, upon facts unique to his case. The Board has not been presented with this type of factual situation in the past with regard to a trainer's responsibility. Accordingly, petitioner's contention that this issue "has far reaching and important application nationally", (Petition at 10), is groundless. Further review by this Court would not serve the interests of justice.

Conclusion

The petition for a writ of certiorari should be denied, with costs.

Dated: New York, New York
May 11, 1983

Respectfully submitted,

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